IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.440 OF 2003

Smt.Suman Madanlal Bora .. Petitioners

Versus

State of Maharashtra & Ors. .. Respondents

Mr.Madhav Jamdar for petitioners

Mr.V.G.Mujumdar for respondent No.7

Mr.S.S.Tatkare, A.P.P. for State.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 8th December 2005.

P.C.

. Rule. Returnable forwith by consent. Respondents waive service.

2. This petition challenges an order passed by the learned Magistrate issuing process upon a complaint filed for the offences punishable under section 138 of Negotiable Instruments Act. The order issuing process was also challenged by the petitioner in revision and the revision application was dismissed by Sessions Judge, Pune vide order dated 26th February 2003. Both these orders passed by the learned Magistrate as well as Sessions Judge are impugned in this petition.

3. Mr.Jamdar, learned Counsel appearing in support of this petition contends that the petitioner is original accused No.6. She is so arrayed because she is mother of Madanlal Bora. The said Madanlal Bora along with petitioner were partners of one Bora Transport Company. Petitioner had resigned/ retired from the firm on 22nd June 2001. The cheque which was subject matter of the complaint was issued on 23rd

November 2001. Same was dishonoured on 28th November 2001. Notice (Exh.B page 16) was issued on 4th December 2001. In these circumstances and in the absence of necessary averments in the complaint viz., that petitioner was responsible for conduct of business of firm being absent in the complaint, as far as petitioner is concerned, same does not disclose any offence much less punishable under section 138 of the N.I.Act.

4. In support of his contention that complaint must contain the averments which are essential, Mr.Jamdar relies upon a decision of Supreme Court reported in 2005 (8) S.C.C.89.

5. On the other hand, Mr.Mujumdar, learned Counsel appearing for original complainant submits that this complaint was filed along with several others alleging identical offences for dishonour of various cheques and a group of petitions came to be filed in this Court

challenging identical orders of issuance of process. Learned Judge (S.S.Parkar, J as His Lordship then was), by an order dated 13th June 2003 has dismissed them. The finding recorded by this Court is that at a stage of issuance of process it was not for this Court to go into the responsibilities and liabilities of the partners of the firm and all such contentions must be urged before the trial court during the course of proceedings. That apart, he submits that as far as complaint is concerned, all averments have been made and in that behalf, he invites my attention to para 2 of the complaint which is annexed as Exh.D.

6. For all these reasons he submits that this is not a fit case for interference under Article 227 of the Constitution of India read with Section 482 of Cr.P.C. and the present petition be dismissed.

7. With the assistance of Mr.Jamdar and Mr.Mujumdar, I have perused the notice which was issued prior to the filing of complaint and the reply of one of the accused thereto. I have also perused the complaint which is annexed as Exh.D (C.C. 45 of 2002). In para 2 this is what is stated:-

> "2. That the complainant is residing at the above mentioned address. That accused No.1 is a Registered Partnership firm and accused Nos. 2 to 6 are the partners of the No.1 firm above. All the accused are doing the business under the name and style "Bora Transport Company" in partnership at 156-B, Ganesh Peth, Pune."

8. The Supreme Court has rendered its decision in the aforesaid matter in the context of the phraseology of section 141 of the

Negotiable Instruments Act. Section 141 deals with offences by companies. Whenever the person committing an offence under section 138 is company then every person who at the time the offence was committed was in charge of and/or responsible to the company for the conduct of the business of the company as well as company shall be deemed to be guilty of the offences and shall be liable to be proceeded and punished accordingly. As to when an offence under section 138 is committed is clear from a reading thereof. It is upon the cheque being returned "unpaid" by the bank. In the instant case, the complaint is completely silent about this material aspect. The complaint does not state that at the time when the cheque was returned unpaid/dishonoured, the petitioner was in any way in charge of and was responsible for the conduct of the business of the company or to the company. It is only thereupon that a prima facie conclusion can be drawn about the guilt of the partner of the firm

who issues a cheque and which is dishonoured. It is not necessary to refer to the Supreme Court decision because after going through averments in the complaint on the touch stone of section 141, in my view, as far as petitioner is concerned, complaint cannot proceed. No offence is committed by the petitioner when admittedly it is not shown that on the date of commission of offence, petitioner was in charge of and responsible to or conducting business of the firm. Complaint, therefore, discloses no offence and allowing the same to proceed as far as petitioner is concerned would be a clear abuse of the process of the Court. Therefore, the complaint being not disclosing an offence and even otherwise to secure the ends of justice by not allowing a 62 years old ex-partner to be dragged in criminal court. Rule is made absolute in terms of prayer clause (a). Complaint stands quashed as far as petitioner is concerned.

(S.C.DHARMADHIKARI, J)